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IN THE

Supreme Court of the United States

NO. 71-1598

OCTOBER TERM, 1971

JAMES D. HODGSON, SECRETARY OF LABOR,
Petitioner

v.

ARNHEIM AND NEELY, INC. ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I Conflict of Circuit Court Decisions

While it is true that there is a direct conflict in the decision rendered herein and the decision in the Fourth Circuit in *Shultz v. Falk*, 439 F (2) 340, cert. denied *sub nom Falk v. Hodgson*, 404 U. S. 827, it is submitted that such inconsistency is not in itself reason for the grant of certiorari in the instant case.

First, it should be remembered that the Third Circuit had the benefit of the decision in the Fourth Circuit, yet declined to follow its reasoning. Indeed, the Third Circuit *reversed* the District Court, which had used the same reasoning as the Fourth Circuit (prior to the latter's decision). Thus, the Third Circuit decision refused to follow *two* other courts, as it was clearly of the opinion that a management firm did not fall within the "enterprise" concept.

Second, the reasoning of the Third Circuit is unassailable. As shown in the Opinion on page 21 of the petition, the Court has refused to hold that the owners of separate buildings can be found to be "related . . . . . for a common business purpose" merely because the owners have hired the same management agent.

The government is attempting to do indirectly what it cannot do directly. If each of the buildings managed by Arnheim and Neely, Inc. were taken separately, coverage under the Act would be lacking in every case. How, then, can a common rental agent transform non-coverage into coverage?

It is a pure distortion of words to say that the activities of Arnheim and Neely, Inc. are "related" and that there is a "common business purpose" in such

activities. Any firm doing business with more than one client or customer would thus be in a "related activity" and have a "common business purpose". It is obvious that the intent of Congress was not to reach this type of situation, but to cover the case of *common ownership* of more than one related business. The typical example are the so-called "bank and insurance" cases, where the bank or insurance company also owned an office building. The ownership of the bank and office building being one, a true enterprise is found.

See: *Wirtz v. Suwannah Bank & Trust Co.* 362 F (2) 357 (1966)

Wirtz v. Columbian Mutual Life Ins. Co. 246 F Supp. 198 (1965)

Lack of common ownership in the instant case makes the distinction crystal clear.

It is submitted that the sound reasoning in the Third Circuit should not be disturbed.

II Impact of Decision

At the time the instant case was filed, the coverage for the years in question required a gross volume of business of $1,000,000. Since that time, Congress has successively reduced the coverage requirements to $500,000 as of February 1, 1967 and to $250,000 as of February 1, 1969.

It is obvious that many more buildings are individually covered by the present law than were covered under the law at the time this action was instituted. With the increased coverage, the government need not resort to the enterprise doctrine for coverage of individual buildings.

The importance of the decision, therefore, has been greatly diminished — and this Honorable Court need not extend its efforts in an exercise of futility.

III CONCLUSION

Despite the admonition of the government that many cases are pending which need guidance, the rule of reason and law should prevail over the government's ignorous argument to create an "enterprise". Other Courts forced to choose between the two opinions of the Third and Fourth Circuits should have no difficulty in applying the Third Circuit reasoning is by far the only possible choice.

The petition for writ of certiorari should be refused.

Respectfully Submitted,

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